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DISCHARGE OF CONTRACTS BY ALTERATION.[1]

II.

Material and Immaterial Alterations.

IT was laid down in Pigot's Case[2] that even an immaterial alteration if made by the obligee avoids a deed. But in Sanderson *v.* Symonds,[3] the English court refused to apply the rule to a policy of insurance, and in Aldous *v.* Cornwell[4] this resolution in Pigot's Case was dissented from. It has been followed in some cases in this country,[5] but most of them were decided a number of years ago, and no such severe rule is generally in force. As has been shown, even material alterations by the obligee, when innocently made, do not bar the obligee's rights.[6] This must be true *a*

[1] Continued from 18 HARV. L. REV. 105.

[2] *Ante*, p. 105.

[3] 1 Brod. & Bing. 426.

[4] L. R. 3 Q. B. 573.

[5] Herdman *v.* Bratten, 2 Har. (Del.) 396; Johnson *v.* Bank, 2 B. Mon. 310, 311; Wickes *v.* Caulk, 5 Har. & J. 36; Haskell *v.* Champion, 30 Mo. 136; First Bank *v.* Fricke, 75 Mo. 178; Hord *v.* Taubman, 79 Mo. 101; Kelly *v.* Thuey, 143 Mo. 422; Bailey *v.* Gilman Bank, 99 Mo. App. 571; Vanauken *v.* Hornback, 2 Green (N. J.) 178; Wright *v.* Wright, 2 Halst. 175; Jones *v.* Crowley, 57 N. J. L. 222; Jackson *v.* Malin, 15 Johns. 293; Nunnery *v.* Cotton, 1 Hawks 222; Morris *v.* Vanderen, 1 Dall. 64; Crockett *v.* Thomason, 5 Sneed 342, 344.

[6] *Ante*, p. 115.

fortiori of immaterial alterations. And the prevailing doctrine is that no immaterial alteration will affect rights and liabilities under a writing, irrespective of the person by whom the alteration was made or his purpose in making it.[1]

The following alterations have been held material: erasing the obligee's name and substituting the name of another as obligee;[2] changing the name of the obligor in a deed, who in fact signed as agent but did not so indicate on the deed, to the name of the principal;[3] or changing the signature of an obligor so as to make the obligation purport to be that of a corporation[4] or firm[5] instead of an individual, or that of an individual instead of a corporation,[6] or that of a surety instead of a principal.[7]

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[1] First Bank *v.* Weidenbeck, 97 Fed. Rep. 896, 897 (C. C. A.); Prim *v.* Hammel, 134 Ala. 652; Nichols *v.* Johnson, 10 Conn. 192; Reed *v.* Kemp, 16 Ill. 445; Ryan *v.* First Bank, 148 Ill. 349; Lisle *v.* Rogers, 18 B. Mon. 528; Tranter *v.* Hibbard, 108 Ky. 265; Cushing *v.* Field, 70 Me. 50; Moye *v.* Herndon, 30 Miss. 110; Burnham *v.* Ayer, 35 N. H. 351; Robertson *v.* Hay, 91 Pa. 242; Note Holders *v.* Funding Board, 16 Lea 46.

[2] Sneed *v.* Sabinal Co., 71 Fed. Rep. 493, 73 Fed. Rep. 925 (C. C. A.); Horst *v.* Wagner, 43 Ia. 373; Bell *v.* Mahin, 69 Ia. 408; Horn *v.* Newton Bank, 32 Kan. 518; Dolbier *v.* Norton, 17 Me. 307; Stoddard *v.* Penniman, 108 Mass. 366; Aldrich *v.* Smith, 37 Mich. 468; German Bank *v.* Dunn, 62 Mo. 79; Robinson *v.* Berryman, 22 Mo. App. 509; Erickson *v.* First Bank, 44 Neb. 622; Cumberland Bank *v.* Penniman, 1 Halst. 215; Gillette *v.* Smith, 18 Hun 10; Davis *v.* Bauer, 41 Ohio St. 257; Hoffman *v.* Planters' Bank, 99 Va. 480. See also Park *v.* Glover, 23 Tex. 469; Broughton *v.* Fuller, 9 Vt. 373. *Contra*, Latshaw *v.* Hiltebeitel, 2 Penny. 257.

Changing the name of a special indorsee in a note is therefore material, Grimes *v.* Piersol, 25 Ind. 246, or adding a name of another person on a railroad mileage book as one entitled to ride. Holden *v.* Rutland R. Co., 73 Vt. 317. But changing the name of the insured in a policy from the name of the agent of a mortgagee to the name of the mortgagor, the loss being made payable, both before and after the alteration, to the mortgagee, was held immaterial since it effected no material change in the ultimate rights under the policy. Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498.

The addition of the word "junior" to the name of the grantee in a deed was held immaterial, as the only effect was to designate more clearly the grantee actually intended. Coit *v.* Starkweather, 8 Conn. 289. So the addition of "with the will annexed," after the word "administrator." Casoni *v.* Jerome, 58 N. Y. 315.

But otherwise of an addition of a designation, which makes the payee in effect different. Hodge *v.* Farmers' Bank, 7 Ind. App 94 (cashier); First Bank *v.* Fricke, 75 Mo. 178 (president); York *v.* Janes, 43 N. J. L. 332 (collector).

[3] North *v.* Henneberry, 44 Wis. 306. But erasure of an initial of the grantor's name in a deed is immaterial, where no change in the person is thereby intended or indicated. Banks *v.* Lee, 73 Ga. 25. See also Chadwick *v.* Eastman, 53 Me. 12.

[4] Sheridan *v.* Carpenter, 61 Me. 83.

[5] Montgomery *v.* Crossthwait, 90 Ala. 553 (though the alteration was made by one having no power to bind the firm); Haskell *v.* Champion, 30 Mo. 136.

[6] Texas Printing Co. *v.* Smith, 14 S. W. Rep. 1074 (Tex. App.).

[7] Laub *v.* Paine, 46 Ia. 550.

Erasing the name of a joint or prior obligor,[1] and changing the amount, time of payment, place of payment, or rate of interest are obviously material, as are the addition of words of negotiability,[2] or of a clause requiring payment in gold;[3] a waiver of demand and notice written over a blank indorsement;[4] the insertion of words of guaranty over such an indorsement,[5] unless the indorser's intention was in fact to be liable as a guarantor;[6] the addition of other property to that described in a deed or mortgage;[7] the insertion in a mortgage of a statement that it was given to secure other debts besides that for which it was in fact given;[8] the insertion in a bond for title of a provision that the vendee shall have immediate pos-

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[1] Smith *v.* United States, 2 Wall. 219; Gillett *v.* Sweat, 6 Ill. 475; State *v.* Griswold, 32 Ind. 313; State *v.* Craig, 58 Ia. 238; Bracken Co. *v.* Daum, 80 Ky. 388; State *v.* Findley, 101 Mo. 217; Blanton *v.* Commonwealth, 91 Va. 1.

But not if the obligor whose name was erased was an infant and had repudiated his contract. Young *v.* Currier, 63 N. H. 419.

[2] Many authorities as to such changes in negotiable paper are collected in 1 Ames Cas. Bills and Notes 447, 448; 2 Century Digest 241 *seq.*

In Tranter *v.* Hibbard, 108 Ky. 265, a note was altered by writing the word "fixed" after the date of payment, which is equivalent to "without grace." By the law of Kentucky such negotiable paper only as is discounted at a bank is entitled to grace. The note in question never was so discounted, and the court therefore held the alteration immaterial, though admitting the note might have been discounted. The case seems wrong. The alteration purported to give the payee an added right to discount the note without entitling the maker to grace. The fact that the payee did not exercise this right cannot make any difference.

Similarly changing the penal sum in a bond. Howe *v.* Peabody, 2 Gray 556; Board *v.* Gray, 61 Minn. 242.

[3] Hanson *v.* Crawley, 41 Ga. 303; Bridges *v.* Winters, 42 Miss. 135; Foxworthy *v.* Colby, 64 Neb. 216; Church *v.* Howard, 17 Hun 5; Darwin *v.* Rippey, 63 N. C. 318; Wills *v.* Wilson, 3 Oreg. 308; Bogarth *v.* Breedlove, 39 Tex. 561.

[4] Andrews *v.* Simms, 33 Ark. 771; Davis *v.* Eppler, 38 Kan. 629; Farmer *v.* Rand, 16 Me. 453; Schwartz *v.* Wilmer, 90 Md. 136; Harnett *v.* Holdrege, 97 N. W. Rep. 443 (Neb.).

But otherwise, if the indorser is also the maker, and hence in no event entitled to demand or notice. Gordon *v.* Third Bank, 144 U. S. 97.

In Schwartz *v.* Wilmer, 90 Md. 136, the words inserted were "protest waived." The court assumed that this was equivalent to a waiver of demand and notice, and that "it converted the contingent liability of the indorser into an absolute liability." This seems wrong. Waiver of protest does not mean waiver of demand and notice. It did not even appear that the note was a foreign note, and as such entitled to protest.

[5] Robinson *v.* Reed, 46 Ia. 219; Belden *v.* Ham, 61 Ia. 42; Clawson *v.* Gustin, 2 South. 947; Orrick *v.* Colston, 7 Gratt. 189.

[6] Iowa Valley Bank *v.* Sigstad, 96 Ia. 491; Levi *v.* Mendell, 1 Duv. 77.

[7] Powell *v.* Pearlstine, 43 S. C. 403; Bowser *v.* Cole, 74 Tex. 222. See also Moelle *v.* Sherwood, 148 U. S. 21. *Cf.* Burnett *v.* McCluey, 78 Mo. 676.

[8] Carlisle *v.* People's Bank, 122 Ala. 446; Johnson *v.* Moore, 33 Kan. 90.

session;[1] the insertion or alteration of the date if that results in altering the legal effect of the instrument, as by changing the day of maturity;[2] the addition[3] or cancellation[4] of a seal after the signature of an obligor, unless a seal would in no way alter the legal effect of the document.[5]

An alteration is none the less material because the change in the contract is advantageous to the obligor. Thus where a later day of payment is substituted the obligation is avoided.[6] So where a smaller amount is substituted in an obligation,[7] or where the specified rate of interest is altered to a lower rate,[8] or where the name of a joint obligor or co-surety is added,[9] or of a prior obligor.[10] The addition of a collateral guaranty does not, however,

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[1] Kelly *v.* Trumble, 74 Ill. 428.

[2] Hirschman *v.* Budd, L. R. 8 Ex. 171; Inglish *v.* Breneman, 5 Ark. 377; Wyman *v.* Yoemans, 84 Ill. 403; Hamilton *v.* Wood, 70 Ind. 306; McCormick Co. *v.* Lauber, 7 Kan. App. 730; Lisle *v.* Rogers, 18 B. Mon. 528; Britton *v.* Dierker, 46 Mo. 591; McMurtrey *v.* Sparks, 71 Mo. App. 126; Bowers *v.* Jewell, 2 N. H. 543; Crawford *v.* West Side Bank, 100 N. Y. 50; Miller *v.* Gilleland, 19 Pa. 119; Taylor *v.* Taylor, 12 Lea 714.

[3] State *v.* Smith, 9 Houst. 143; Morrison *v.* Welty, 18 Md. 169; Rawson *v.* Davidson, 49 Mich. 607; Fred Heim Co. *v.* Hazen, 55 Mo. App. 277; Biery *v.* Haines, 5 Whart. 563; Vaughan *v.* Fowler, 14 S. C. 355.

[4] Porter *v.* Doby, 2 Rich. Eq. 49; Organ *v.* Allison, 9 Baxt. 459; Piercy *v.* Piercy, 5 W. Va. 199.

[5] Truett *v.* Wainwright, 9 Ill. 411.

[6] Wood *v.* Steele, 6 Wall. 80; Wyman *v.* Yoemans, 84 Ill. 403; Post *v.* Losey, 111 Ind. 74; McCormick Co. *v.* Lauber, 7 Kan. App. 730; First Bank *v.* Payne, 19 Ky. L. Rep. 839. But see *contra*, Union Bank *v.* Cook, 2 Cranch C. C. 218.

[7] Prim *v.* Hammel, 134 Ala. 652; Johnston *v.* May, 76 Ind. 293. See also Doane *v.* Eldridge, 16 Gray 254.

[8] Post *v.* Losey, 111 Ind. 74; Board *v.* Greenleaf, 80 Minn. 242; Whitmer *v.* Frye, 10 Mo. 348. But see *contra*, Burkholder *v.* Lapp's Ex., 31 Pa. 322.

[9] Gardner *v.* Walsh, 5 E. & B. 83; Taylor *v.* Johnson, 17 Ga. 521; Henry *v.* Coats, 17 Ind. 161; Bowers *v.* Briggs, 20 Ind. 139; Houck *v.* Graham, 106 Ind. 195; Hall's Adm. *v.* McHenry, 19 Ia. 521; Hamilton *v.* Hooper, 46 Ia. 515; Berryman *v.* Manker, 56 Ia. 150; Sullivan *v.* Rudisill, 63 Ia. 158; Shipp *v.* Suggett, 9 B. Mon. 5; Singleton *v.* McQuerry, 85 Ky. 41; Lunt *v.* Silver, 5 Mo. App. 186; Wallace *v.* Jewell, 21 Ohio St. 163; Harper *v.* Stroud, 41 Tex. 367. But see *contra*, Produce Exchange Trust Co. *v.* Bieberbach, 176 Mass. 577, 590; Gano *v.* Heath, 36 Mich. 441; Union Banking Co. *v.* Martin's Estate, 113 Mich. 521; Standard Cable Co. *v.* Stone, 35 N. Y. App. Div. 62, 65.

The alteration is none the less material if the added signature is forged. Farmers' Bank *v.* Myers, 50 Mo. App. 157; Harper *v.* Stroud, 41 Tex. 367.

If the addition is without the knowledge of the obligee, it is an alteration by a stranger and hence in this country would generally have no effect. Anderson *v.* Bellenger, 87 Ala. 334; Ward *v.* Hackett, 30 Minn. 150; Standard Cable Co. *v.* Stone, 35 N. Y. App. Div. 62.

[10] Haskell *v.* Champion, 30 Mo. 136.

discharge the principal debtor,[1] for the addition neither increases nor diminishes his immediate liability or his ultimate equitable liability. The same is true of the erasure of the name of a collateral guarantor.[2]

If, however, a surety's name is added in such a way that he incurs or purports to incur at law a joint obligation with others previously bound by the instrument, the alteration seems technically a material one, though his equitable liability was one of suretyship, for the alteration if effective would create a new and different obligation at law on the part of the previous obligors. They could be sued jointly with the surety. The answer adopted in one decision[3] to this reasoning is that the surety having signed after delivery of the note was not in fact a joint maker, and that as the original maker could effectively object to the joinder of the new signer the former's obligation remained unaltered. But this is unsound. An alteration to which he has not consented never binds an obligor. He is discharged not because an alteration is in legal effect wrought upon his obligation, but because it purports to be; and in the case in question the obligation of the defendant was on the face of the instrument changed to a joint obligation. Nevertheless, on account of the hardship of the case the addition has in such a case frequently been held immaterial.[4] But there are many cases enforcing the strict rule.[5]

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[1] *Ex parte* Yates, 2 De G. & J. 191; First Bank *v.* Weidenbeck, 97 Fed. Rep. 896 (C. C. A.); Burnham *v.* Gosnell, 47 Mo. App. 637; Wallace *v.* Jewell, 21 Ohio St. 163, 172; Hutches *v.* J. I. Case Co., 35 S. W. Rep. 60 (Tex. Civ. App.). See *a fortiori* cases in note 4, *infra*. *Cf.* Oneale *v.* Long, 4 Cranch 60.

[2] First Bank *v.* Weidenbeck, 97 Fed. Rep. 896 (C. C. A.); Broughton *v.* West, 8 Ga. 248; People *v.* Call, 1 Denio 120; Huntington *v.* Finch, 3 Ohio St. 445.

[3] McCaughey *v.* Smith, 27 N. Y. 39. See also *Ex parte* Yates, 2 De G. & J. 191; Bowser *v.* Rendell, 31 Ind. 128.

[4] *Ex parte* Yates, 2 De G. & J. 191; Mersman *v.* Werges, 112 U. S. 139; Montgomery Railroad *v.* Hurst, 9 Ala. 513; Rudulph *v.* Brewer, 96 Ala. 189 (overruled); Bowser *v.* Rendell, 31 Ind. 128; Taylor *v.* Acom, 1 Ind. Ty. 436; Stone *v.* White, 8 Gray 589; Miller *v.* Finley, 26 Mich. 249; Barnes *v.* Van Keuren, 31 Neb. 165; Royse *v.* State Bank, 50 Neb. 16; McCaughey *v.* Smith, 27 N. Y. 39; Hecker *v.* Mahler, 64 Ohio St. 398. See also Ryan *v.* First Bank, 148 Ill. 349; Heath *v.* Blake, 28 S. C. 406.

[5] Gardner *v.* Walsh, 5 E. & B. 83; First Bank *v.* Weidenbeck, 81 Fed. Rep. 271 (reversed, 97 Fed. Rep. 896); Brown *v.* Johnson, 126 Ala. 93 (overruling Montgomery R. Co. *v.* Hurst, 9 Ala. 513, and, it seems, Rudulph *v.* Brewer, 96 Ala. 189); Soaps *v.* Eichberg, 42 Ill. App. 375; Bowers *v.* Briggs, 20 Ind. 139; Nicholson *v.* Combs, 90 Ind. 515; Dickerman *v.* Miner, 43 Ia. 508; Hamilton *v.* Hooper, 46 Ia. 515; Sullivan *v.* Rudisill, 63 Ia. 158; Browning *v.* Gosnell, 91 Ia. 448; Rhoades *v.* Leach, 93 Ia. 337; Shipp *v.* Suggett, 9 B. Mon. 5; Singleton *v.* McQuerry, 85 Ky. 41; Lunt

In two cases[1] where the name added created or purported to create a several liability on the part of the new signer the previous signer was held not discharged because no joint liability was created. The terms of the legal obligation of the previous signer are certainly not affected by such an addition, but if the consequence of carrying out the obligation assumed by the new signer is that equitably the latter must pay equally with the previous signer, the contract is certainly altered by the added signature. Such is the situation where the new signer is a co-surety. If, however, the only previous signer is the principal debtor, the contract is not altered, for he remains liable immediately at law and ultimately in equity for the whole.

The following changes have been held immaterial: the alteration of the name of the grantee[2] or grantor[3] or other party[4] by correcting a mistake in spelling or initials, where no change in the person designated is intended or apparently indicated; the insertion of a more specific description of the mortgaged property in a chattel mortgage;[5] the addition in a bond to pay a judgment of a provision for payment of legal costs, since that was the effect of the bond originally;[6] the insertion or alteration of the date when that does not alter the legal effect of the instrument by changing the day of maturity or otherwise;[7] the insertion of the name of the obligor in the body of a bond, after the execution of the bond,[8] since the obligor would be liable though his name had not been inserted; the alteration of the courses named in a

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v. Silver, 5 Mo. App. 186; Farmers' Bank *v.* Myers, 50 Mo. App. 157; Allen *v.* Dornan, 57 Mo. App. 288; Wright *v.* Kelley, 4 Lans. 57; Harper *v.* Stroud, 41 Tex. 367; Ford *v.* Cameron Bank, 34 S. W. Rep. 684 (Tex. Civ. App.).

[1] Collins *v.* Prosser, 1 B. & C. 682; Brownell *v.* Winnie, 29 N. Y. 400.

[2] State *v.* Dean, 40 Mo. 464; Cole *v.* Hills, 44 N. H. 227; Derby *v.* Thrall, 44 Vt. 413.

[3] Banks *v.* Lee, 73 Ga. 25.

[4] *Re* Howgate & Osborn's Contract, [1902] 1 Ch. 451.

[5] Starr *v.* Blatner, 76 Ia. 356; Chicago Trust Co. *v.* O'Marr, 18 Mont. 568. See also Heman *v.* Gilliam, 171 Mo. 258; Gunter *v.* Addy, 58 S. C. 178. But see *contra*, McKinney *v.* Cobell, 24 Ind. App. 676, which went on the ground that the more specific description would charge third persons with notice. See further s. c., 31 Ind. App. 548.

[6] Kleeb *v.* Bard, 12 Wash. 140.

[7] Parry *v.* Nicholson, 13 M. & W. 778; Gill *v.* Hopkins, 19 Ill. App. 74; Lee *v.* Lee, 83 Ia. 565; Prather *v.* Zulauf, 38 Ind. 155; Terry *v.* Hazlewood, 1 Duv. 104; State *v.* Miller, 3 Gill 335; Hepler *v.* Mt. Carmel Bank, 97 Pa. 420; Whiting *v.* Daniel, 1 Hen. & M. 391; Bashaw's Adm. *v.* Wallace's Adm., 45 S. E. 290 (Va.). But see Bills of Ex. Act, § 64 (2); Crawford, Neg. Inst. L. § 206.

[8] Smith *v.* Crooker, 5 Mass. 538.

deed where the alteration was required by the context and was in accordance with the facts;[1] the insertion of a recital of unessential circumstances;[2] the addition[3] or cancellation[4] of words of description, or the addition of a place of residence,[5] after the signature of an obligor; the erasure of the name of a surety, so far as the principal debtor is concerned;[6] the addition of a memorandum, which does not purport to form part of the document itself.[7] Under this last rule the addition or alteration of the figures indicating the amount of a bill or note is immaterial, if the body of the writing clearly states the amount,[8] for the figures are rather a memorandum than an integral part of the obligation. But if a memorandum collateral in form is in fact a part of the contract, the erasure of the memorandum is a material alteration.[9]

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[1] Burnham *v.* Ayer, 35 N. H. 351.

[2] Rudesill *v.* County Court, 85 Ill. 446.

[3] Manufacturers' Bank *v.* Follett, 11 R. I. 92 (agent).

[4] Burlingame *v.* Brewster, 79 Ill. 515; Marx *v.* Luling Assoc., 17 Tex. Civ. App. 408.

[5] Struthers *v.* Kendall, 41 Pa. 214. *Cf.* Commercial Bank *v.* Patterson, 2 Cranch. C. C. 346.

[6] Lynch *v.* Hicks, 80 Ga. 200; Loque *v.* Smith, Wright (Ohio) 10; Tutt *v.* Thornton, 57 Tex. 35.

[7] Manning *v.* Maroney, 87 Ala. 563; Maness *v.* Henry, 96 Ala. 454; Mente *v.* Townsend, 68 Ark. 391; Carr *v.* Welch, 46 Ill. 88; Huff *v.* Cole, 45 Ind. 300; Toner *v.* Wagner, 158 Ind. 447; Light *v.* Killinger, 16 Ind. App. 102; Reed *v.* Culp, 63 Kan. 595; Nugent *v.* Delhomme, 2 Mart. (O. S.) 308; Littlefield *v.* Coombs, 71 Me. 110; Cole's Lessee *v.* Pennington, 33 Md. 476; Cambridge Bank *v.* Hyde, 131 Mass. 77; Boutelle *v.* Carpenter, 182 Mass. 417; American Bank *v.* Bangs, 42 Mo. 450; Moore *v.* Macon Bank, 22 Mo. App. 684; Johnson *v.* Parker, 86 Mo. App. 660; Palmer *v.* Largent, 5 Neb. 223; Edward Thompson Co. *v.* Baldwin, 62 Neb. 530. Kinard *v.* Glenn, 29 S. C. 590; Yost *v.* Watertown Steam Engine Co., 24 S. W. Rep. 657 (Tex., Civ. App.); Tremper *v.* Hemphill, 8 Leigh 623. See also Sawyer *v.* Campbell, 107 Ia. 397; Steeley's Credr's *v.* Steeley, 23 Ky. L. Rep. 996. *Cf.* Warrington *v.* Early, 2 E. & B. 763; Woodworth *v.* Bank of America, 19 Johns. 391.

[8] Horton *v.* Horton's Est., 71 Ia. 448; Woodfolk *v.* Bank of America, 10 Bush 504; Fisk *v.* McNeal, 23 Neb. 726; Smith *v.* Smith, 1 R. I. 398.

In Schryver *v.* Hawkes, 22 Ohio St. 308, a *bona fide* purchaser was allowed to recover on a note where the figures had been raised, though the amount was left blank in the body of the note and the figures had been written by the defendant in order to limit the amount for which the blank space for the amount could be filled in.

[9] Cochran *v.* Nebeker, 48 Ind. 459; Scofield *v.* Ford, 56 Ia. 370; Johnson *v.* Heagan, 23 Me. 329; Wheelock *v.* Freeman, 13 Pick. 165; Wait *v.* Pomeroy, 20 Mich. 425; Bay *v.* Shrader, 50 Miss. 326; Davis *v.* Henry, 13 Neb. 497; Gerrish *v.* Glines, 56 N. H. 9; Price *v.* Tallman, Coxe (N. J.) 447; Benedict *v.* Cowden, 49 N. Y. 396; Stephens *v.* Davis, 85 Tenn. 271. See also Law *v.* Crawford, 67 Mo. App. 150. *Cf.* Theopold *v.* Deike, 76 Minn. 121; Law *v.* Blomberg, 91 N. W. Rep. 206 (Neb.). Hubbard *v.* Williamson, 5 Ired. 397. But if a condition qualifying the liability of the maker of a note is written with a pencil and the condition is afterwards erased, the

Alteration by adding or changing a statement of the consideration does not ordinarily change the legal effect of an obligation, and if that is the correct test, as is generally held, in the American decisions,[1] such an alteration is immaterial.[2] But a statement of consideration may be important as evidence of the terms of a transaction, and if added or erased fraudulently should make the writing inadmissible as evidence upon that question at least.[3] If the writing was the sole legal evidence by which the debt could be proved, the alteration would then be fatal to any recovery by the plaintiff; otherwise not.[4] The same may be said in regard to an alteration of the number of a bond or bank note;[5] or of

maker has been held liable, because of his negligence, to a *bona fide* purchaser without notice on the note in its altered form. Harvey *v.* Smith, 55 Ill. 224; Seibel *v.* Vaughan, 69 Ill. 257. This principle has been carried so far in some cases as to hold the maker liable when a condition written below the note has been cut off. Noll *v.* Smith, 64 Ind. 511; Phelan *v.* Moss, 67 Pa. 59; Zimmerman *v.* Rote, 75 Pa. 188. These decisions are on their facts opposed to several of the cases cited above. *Cf.* Brown *v.* Reed, 79 Pa. 370.

[1] See the American cases here cited on materiality and immateriality. So in Caldwell *v.* Parker, Ir. Rep. 3 Eq. 519. This decision was dissented from in Suffell *v.* Bank of England, 9 Q. B. D. 555.

[2] Riggs *v.* St. Clair, 1 Cranch C. C. 606; Murray *v.* Klinzing, 64 Conn. 78; Gardiner *v.* Harback, 21 Ill. 129; Magers *v.* Dunlap, 39 Ill. App. 618; Cheek *v.* Nall, 112 N. C. 370. But see Knill *v.* Williams, 10 East 431; Wright *v.* Inshaw, 1 Dowl. N. S. 802; Suffell *v.* Bank of England, 9 Q. B. D. 555, 571; Benjamin *v.* McConnel, 9 Ill. 536; Low *v.* Argrove, 30 Ga. 129. *Cf.* Richardson *v.* Fellner, 9 Okl. 513.

[3] See *post*, p. 180. In Suffell *v.* Bank of England, 9 Q. B. D. 555, the Court of Appeal held an alteration of the number of a bank note material, though admitting the change did not alter the legal effect of the contract. In Craighead *v.* McLoney, 99 Pa. 211, it was said, "Any alteration which changes the evidence or mode of proof is material," and in Brady *v.* Berwind-White Co., 94 Fed. Rep. 28, 106 Fed. Rep. 824 (E. D. Pa.), an addition was held material which did not change the meaning of the writing, because it would render inadmissible parol evidence of facts contradicting the inserted words. This is in accordance with earlier Pennsylvania cases holding the addition of an attesting witness material. Foust *v.* Renno, 8 Pa. 378; Henning *v.* Werkheiser, 8 Pa. 518. See also White Sewing Machine Co. *v.* Saxon, 121 Ala. 399; International Bank *v.* Parker, 88 Mo. App. 117. If this principle were logically applied it would overthrow many of the cases of immaterial alteration collected here. With the English and Pennsylvania decisions may be compared Rowe *v.* Bowman, 183 Mass. 488. In that case it was argued that the unauthorized addition of a United States Revenue stamp was a material alteration. The lack of a stamp, though it would not have made the note inadmissible in evidence in the Massachusetts courts, would have made it inadmissible in the Federal Courts. The addition therefore purported to enlarge the rights of the holder by affording evidence legal in the Federal Courts. The plaintiff nevertheless recovered.

[4] See *post*, p. 174 *et seq.*

[5] Such a change was held material in Suffell *v.* Bank of England, 9 Q. B. D. 555; but immaterial in Wylie *v.* Missouri Pac. Ry. Co., 41 Fed. Rep. 623; State *v.* Cobb, 64 Ala. 127, 157; Comm. *v.* Emigrant Bank, 98 Mass. 12; Elizabeth *v.* Force, 29 N. J.

adding[1] or erasing[2] the name of an attesting witness, where the legal effect of the instrument is not affected by attestation, but only the mode of proof.

Whether an alteration is material is a question of law, to be decided by the court.[3]

Assignment of Altered Contracts.

If a contract has been made void by alteration, no subsequent assignment, even if the contract is a negotiable bill or note, can give it validity. The assignee or indorsee, though an innocent purchaser for value, has no greater rights than the previous holder.[4] How far this rule is subject to an exception if the alteration con-

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Eq. 587; Birdsall *v.* Russell, 29 N. Y. 239; Note Holders *v.* Funding Board, 16 Lea 46; Fisk's Claim, 11 Op. Atty. Gen. 258. Sometimes the number of a bond may affect the contract, as where bonds are paid as their numbers are drawn. See Suffell *v.* Bank of England, 9 Q. B. D. 555, 563.

[1] Held immaterial in Hall *v.* Weaver, 34 Fed. Rep. 104; Ford *v.* Ford, 17 Pick. 418; State *v.* Gherkin, 7 Ired. L. 206; Beary *v.* Haines, 4 Whart. 17; Fuller *v.* Green, 64 Wis. 159. But see *contra*, White Sewing Machine Co. *v.* Saxon, 121 Ala. 399; Adams *v.* Frye, 3 Met. 107; Girdner *v.* Gibbons, 91 Mo. App. 412; Foust *v.* Renno, 8 Pa. 378; Henning *v.* Werkheiser, 8 Pa. 518. It is material if the legal effect of the instrument would be changed thereby, as by extending the statute of limitations. Milberry *v.* Stover, 75 Me. 69; Homer *v.* Wallis, 11 Mass. 309. See also Richardson *v.* Mather, 178 Ill. 449.

[2] Wickes *v.* Caulk, 5 H. & J. 36. *Cf.* Nunnery *v.* Cotton, 1 Hawks 222.

[3] Steele *v.* Spencer, 1 Pet. 552; Payne *v.* Long, 121 Ala. 385; Overton *v.* Matthews, 35 Ark. 146; Ofenstein *v.* Bryan, 20 App. D. C. 1; Milliken *v.* Marlin, 66 Ill. 13; Cochran *v.* Nebeker, 48 Ind. 459; Heard *v.* Tappan, 116 Ga. 930; Belfast Nat. Bank *v.* Harriman, 68 Me. 522; Fisherdick *v.* Hutton, 44 Neb. 122; Burnham *v.* Ayer, 35 N. H. 351; Stephens *v.* Graham, 7 S. & R. 505; Kinard *v.* Glenn, 29 S. C. 590.

[4] Master *v.* Miller, 4 T. R. 320; Vance *v.* Lowther, 1 Ex. D. 176; Suffell *v.* Bank of England, 9 Q. B. D. 555; Overton *v.* Matthews, 35 Ark. 146; Burwell *v.* Orr, 84 Ill. 465; Merritt *v.* Boyden, 191 Ill. 136; McCoy *v.* Lockwood, 71 Ind. 319; Eckert *v.* Louis, 84 Ind. 99, 104; Horn *v.* Newton Bank, 32 Kan. 518; Farmer *v.* Rand, 14 Me. 225; Schwartz *v.* Wilmer, 90 Md. 136; Belknap *v.* National Bank, 100 Mass. 376; Cape Ann Bank *v.* Burns, 129 Mass. 596; Hunter *v.* Parsons, 22 Mich. 96; Coles *v.* Yorks, 28 Minn. 464 (mortgage); Trigg *v.* Taylor, 27 Mo. 245; Hurlbut *v.* Hall, 39 Neb. 889; Erickson *v.* First Bank, 44 Neb. 622; Haines *v.* Dennett, 11 N. H. 180; Gettysburg Bank *v.* Chisholm, 169 Pa. 564. See also Burwell *v.* Orr, 84 Ill. 465; Pereau *v.* Frederic, 17 Neb. 117; Walla Walla Co. *v.* Ping, 1 Wash. Ty. 339.

The English Bills of Exchange Act, § 64 (1), qualified this rule by the following proviso: "Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour." And the substance of this proviso has been adopted in the Negotiable Instruments Law in this country. Crawford, Neg. Inst. L. § 205; Schwartz *v.* Wilmer, 90 Md. 136, 143.

sisted in filling in a blank left by the obligor is a disputed question. If the instrument was incomplete and a blank in it was later filled in accordance with express or implied authority, the case is covered by what has been said of alterations made by consent.[1] If the instrument was incomplete and the obligee or another authorized to fill the blank in a certain way fills it in a different way, the case is one of an agent exceeding his actual but not his apparent authority. In such a case his principal should be liable on the instrument in its altered form to an innocent purchaser buying without notice, actual or constructive, of the excess of authority.[2] Where, however, the instrument was complete when issued but contained spaces which could be filled in without exciting suspicion, there is no agency. If the obligor is liable, it must be

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[1] Such cases are State *v.* Dean, 40 Mo. 464; Kinney *v.* Schmitt, 12 Hun 521; Stahl *v.* Berger, 10 S. & R. 170; Walla Walla Co. *v.* Ping, 1 Wash. Ty. 339. See further, *ante*, p. 115 *et seq.*

Issuing a negotiable instrument with blanks gives any *bona fide* holder authority to fill them with appropriate words. Michigan Bank *v.* Eldred, 9 Wall. 544; Huntington *v.* Bank, 3 Ala. 186; Visher *v.* Webster, 8 Cal. 109; Norwich Bank *v.* Hyde, 13 Conn. 279; Riddle *v.* Stevens, 32 Conn. 378, 390; Young *v.* Ward, 21 Ill. 223; Spitler *v.* James, 32 Ind. 202; Gillaspie *v.* Kelley, 41 Ind. 158; Lowden *v.* Schoharie Bank, 38 Kan. 533; Bank *v.* Curry, 2 Dana 142; Cason *v.* Grant County Bank, 97 Ky. 487; Ives *v.* Farmers' Bank, 2 Allen 236; Russell *v.* Langstaffe, Doug. 514; Scotland Bank *v.* O'Connel, 23 Mo. App. 165; Mitchell *v.* Culver, 7 Cow. 336; Redlich *v.* Doll, 54 N. Y. 234; Waggoner *v.* Millington, 8 Hun 142; Porter *v.* Hardy, 10 N. Dak. 551; Fullerton *v.* Sturges, 4 Ohio St. 529; Cox *v.* Alexander, 30 Oreg. 438; Wessell *v.* Glenn, 108 Pa. 104; Douglas *v.* Scott, 8 Leigh 43. But see *contra*, Inglish *v.* Breneman, 9 Ark. 122; Holmes *v.* Trumper, 22 Mich. 427; Morehead *v.* Parkersburg Bank, 5 W. Va. 74 (overruled in First Bank *v.* Johns, 22 W. Va. 520). See also Young *v.* Baker, 29 Ind. App. 130; Greenfield Bank *v.* Stowell, 123 Mass. 196.

This principle was applied to other contracts in Roe *v.* Town Ins. Co., 78 Mo. App. 452; Kinney *v.* Schmitt, 12 Hun 521. *Cf.* Solon *v.* Williamsburgh Bank, 114 N. Y. 122.

[2] Hatch *v.* Searles, 2 Sm. & G. 147; Garrard *v.* Lewis, 10 Q. B. D. 30; Michigan Bank *v.* Eldred, 9 Wall. 544; Prim *v.* Hammel, 134 Ala. 652; Overton *v.* Matthews, 35 Ark. 146; Elliott *v.* Levings, 54 Ill. 214; Spitler *v.* James, 32 Ind. 202; De Pauw *v.* Bank, 126 Ind. 551, 557; Geddes *v.* Blackmore, 132 Ind. 551 (*cf.* Pope *v.* Branch County Bank, 23 Ind. App. 210); Woolfolk *v.* Bank of America, 10 Bush 517; Breckenridge *v.* Lewis, 84 Me. 349; Weidman *v.* Symes, 120 Mich. 657; Simmons *v.* Atkinson, 69 Miss. 862, 865; Redlich *v.* Doll, 54 N. Y. 234; Ross *v.* Doland, 29 Ohio St. 473; Cox *v.* Alexander, 30 Oreg. 438; Wessell *v.* Glenn, 108 Pa. 104; Orrick *v.* Colston, 33 Gratt. 377. But see Riddle *v.* Stevens, 32 Conn. 378; Holmes *v.* Trumper, 22 Mich. 427; Solon *v.* Williamsburgh Bank, 114 N. Y. 122; Porter *v.* Hardy, 10 N. Dak. 551.

So where a note apparently complete is delivered on the condition that another maker's name shall be obtained, the condition is invalid against an innocent purchaser. Ward *v.* Hackett, 30 Minn. 150; and see many decisions in accord in Ames Cas. Suretyship 305 *n.*

because he was so negligent in leaving spaces which invited alteration that he cannot be allowed to assert the defense of alteration against an innocent holder. In the leading case of Young *v.* Grote[1] the maker was held liable where he had carelessly left an unfilled space after the amount of a check. The case seems sound in principle and has been followed in this country.[2] It has, however, been practically overruled in England.[3] Of course, it is only when spaces are left in such a way that the obligor must be regarded as careless in view of existing mercantile usage that the doctrine of Young *v.* Grote is applicable.[4] It is not applicable to instruments other than negotiable paper.[5]

When a Debt Survives, though the Writing is Destroyed.

While the doctrine of alteration was applied only to obligations under seal, there was no question that if the validity of the document was destroyed by alteration, the debt represented by the document was equally destroyed, and in no form of action could the holder get relief. But with the extension of the doctrine of alteration to writings which are only evidence, and perhaps not the sole evidence, of the obligation, the technical reason for regarding the obligation as totally destroyed does not hold good, for the existence of a simple contract obligation is not in theory dependent on the evidence by which it is proved. If, therefore, in such a case the obligee is held to lose all rights, even though it would be possible to prove the obligation by legal evidence, it is because the policy requiring that the purity of written evidence shall be

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[1] 4 Bing. 254.

[2] Young *v.* Lehman, 63 Ala. 519; Winter *v.* Pool, 104 Ala. 580; Yocum *v.* Smith, 63 Ill. 321; Lowden *v.* National Bank, 38 Kan. 533; Blakey *v.* Johnson, 13 Bush 204; Cason *v.* Grant County Bank, 97 Ky. 487; Isnard *v.* Torres, 10 La. Ann. 103; First Bank *v.* Webster, 121 Mich. 149; Scotland County Bank *v.* O'Connell, 23 Mo. App. 166; Garrard *v.* Haddan, 67 Pa. 82; Zimmerman *v.* Rote, 75 Pa. 188; Johnson Harvester Co. *v.* McLean, 57 Wis. 258, but see Fordyce *v.* Kosminski, 49 Ark. 40; Walsh *v.* Hunt, 120 Cal. 46; Cronkhite *v.* Nebeker, 81 Ind. 319; De Pauw *v.* Bank of Salem, 126 Ind. 553; Knoxville Bank *v.* Clarke, 51 Ia. 264; First Bank *v.* Zeims, 93 Ia. 140; Burrows *v.* Klunk, 70 Md. 451; Greenfield Bank *v.* Stowell, 123 Mass. 196; Burson *v.* Huntington, 21 Mich. 415; Simmons *v.* Atkinson, 69 Miss. 862; Goodman *v.* Eastman, 4 N. H. 455; Worrall *v.* Gheen, 39 Pa. 388.

[3] Scholfield *v.* Earl of Londesborough, [1895] 1 Q. B. 536, [1896] A. C. 514.

[4] See cases in note 2 *supra*, also Harvey *v.* Smith, 55 Ill. 224; Derr *v.* Keaough, 96 Ia. 397; Bank of Billings *v.* Wade, 73 Mo. App. 558; Leas *v.* Walls, 101 Pa. 57.

[5] Lehman *v.* Central Co., 12 Fed. Rep. 595; Cronkhite *v.* Nebeker, 81 Ind. 319; Smith *v.* Holzhauer, 67 N. J. L. 202. See also Solon *v.* Williamsburgh Bank, 114 N. Y. 122, 136.

maintained demands the imposition of a severe penalty on those who tamper with such evidence.[1]

In most of the cases upon the point the altered writing was a bill of exchange or promissory note, and it has been held in England that as between the original parties the alteration does not extinguish the liability on account of which the instrument was given.[2] In this country the distinction has been taken between an alteration made fraudulently and an alteration not made fraudulently. In the latter case, as has been seen, the alteration in many jurisdictions will not bar recovery on the instrument itself;[3] but where such recovery is barred, relief is granted by allowing recovery on the original debt or consideration for which the instrument was given.[4] Where the instrument was given in conditional pay-

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[1] Whether the rule against alteration is wider in its effect than a rule of evidence, forbidding the use of writings materially and wrongfully altered, is well illustrated by the case of a contract executed in duplicate, one part of which is thereafter fraudulently and materially altered. If the requirement of the law is merely that the altered writing shall not be given in evidence, the fraudulent party may still prove his right by the unaltered part, for each part is an original. 1 Greenl. Ev. (16th ed.) § 563. But if the fact that he has fraudulently altered a writing which embodies the contract is, as matter of substantive law, a defense there can be no recovery. The former view is supported by two decisions in regard to duplicate leases. Lewis *v.* Payn, 8 Cow. 71; Jones *v.* Hoard, 59 Ark. 42. Since a lease is primarily a conveyance, these cases may perhaps be distinguished from the case supposed. Certainly the conclusion, if applied to executory contracts, cannot be regarded as free from doubt. An affirmative plea alleging alteration of the contract would, it seems, set up a good defense and would be supported by proof of the facts. Chitty, Pleading (16th Am. ed.) 299; *post*, p. 179.

[2] Atkinson *v.* Hawdon, 2 A. & E. 628; Sloman *v.* Cox, 1 C. M. & R. 471. See also Hall *v.* Fuller, 5 B. & C. 750.

But there could be no recovery against a party secondarily liable on the instrument, for the consideration received by him, since the alteration has deprived him of any right to recover over against prior parties to the instrument. Alderson *v.* Langdale, 3 B. & Ad. 663.

[3] See *ante*, p. 115.

[4] Little *v.* Fowler, 1 Root 94; Warren *v.* Layton, 3 Harring. (Del.) 404; Vogle *v.* Ripper, 34 Ill. 100; Elliott *v.* Blair, 47 Ill. 342; Hayes *v.* Wagner, 89 Ill. 390; Wallace *v.* Wallace, 8 Ill. App. 69; First Bank *v.* Ryan, 31 Ill. App. 271, 38 Ill. App. 268 (aff'd 148 Ill. 349); Hampton *v.* Mayes, 3 Ind. Ty. 65; Krause *v.* Meyer, 32 Ia. 566; Morrison *v.* Huggins, 53 Ia. 76; Eckert *v.* Pickel, 59 Ia. 545; Maguire *v.* Eichmeier, 109 Ia. 301, 304; Hervey *v.* Hervey, 15 Me. 357; Morrison *v.* Welty, 18 Md. 169; Owen *v.* Hall, 70 Md. 97; State Bank *v.* Shaffer, 9 Neb. 1; Lewis *v.* Schenck, 18 N. J. Eq. 459; Hunt *v.* Gray, 35 N. J. L. 227; Merrick *v.* Boury, 4 Ohio St. 60; Savage *v.* Savage, 36 Oreg. 268; Keene *v.* Weeks, 19 R. I. 309; Wyckoff *v.* Johnson, 2 S. D. 91; Otto *v.* Halff, 89 Tex. 384; Matteson *v.* Ellsworth, 33 Wis. 488. See also Craig *v.* Lowe, 36 Ga. 117; *contra* are White *v.* Hass, 32 Ala. 430; Toomer *v.* Rutland, 57 Ala. 379.

As the note, though void because of alteration, may be injurious to the defendant

ment of an antecedent debt, there is no difficulty in reaching this result. The instrument has not been paid at maturity, and the old debt therefore still exists. But the same result would probably be reached in this country, though no debt had ever existed before the transaction of which the delivery of the instrument was a part, though a recovery of the consideration or its value must in such a case be supported on principles of quasi-contract. If a material alteration is made fraudulently, however, no recovery can be had in any form of action either on the instrument or the original debt or consideration.[1]

The application of these principles seems clear in the case of alteration of a mortgage note or bond. If the effect of the alteration is to discharge not simply the note or bond, but the debt itself, the mortgage, being an incident of the debt, must also fall.[2] If, however, the alteration was not due to fraud of the holder, the debt is not discharged, whether the altered obligation is or not; and if the debt is not discharged the mortgage will survive.[3] If a mortgage is given to secure several separate obligations, such an alteration of one of them as avoids the debt represented thereby, avoids also the lien of the mortgage as to that obligation, but not as to the other obligations.[4]

Though an obligor whose obligation has been materially and fraudulently altered may thus keep the consideration which he has

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if it remains outstanding, the plaintiff is required to surrender the note in order to recover on the consideration. Morrison *v.* Welty, 18 Md. 169; Smith *v.* Mace, 44 N. H. 553, 560; Booth *v.* Powers, 56 N. Y. 22, 31. *Cf.* Eckert *v.* Pickel, 59 Ia. 545.

[1] Elliott *v.* Blair, 47 Ill. 342; Ballard *v.* Franklin Ins. Co., 81 Ind. 239; Woodworth *v.* Anderson, 63 Ia. 503; Hocknell *v.* Sheley, 66 Kan. 357; Warder, etc., Co. *v.* Willyard, 46 Minn. 531; Walton Plow Co. *v.* Campbell, 35 Neb. 173; Martendale *v.* Follett, 1 N. H. 95; Smith *v.* Mace, 44 N. H. 553; Clute *v.* Small, 17 Wend. 238; Kennedy *v.* Crandell, 3 Lans. 1; Meyer *v.* Huneke, 55 N. Y. 412; Booth *v.* Powers, 56 N. Y. 22. Otherwise in South Carolina. See the following note.

[2] Vogle *v.* Ripper, 34 Ill. 100; Elliott *v.* Blair, 47 Ill. 342; Tate *v.* Fletcher, 77 Ind. 102; Bowman *v.* Mitchell, 79 Ind. 84; Hocknell *v.* Sheley, 66 Kan. 357; Walton Plow Co. *v.* Campbell, 35 Neb. 173.

In South Carolina, even a fraudulent alteration by the holder of the note or bond will not discharge the mortgage. Plyler *v.* Elliott, 19 S. C. 264; Smith *v.* Smith, 27 S. C. 166; Heath *v.* Blake, 28 S. C. 406. See also Bailey *v.* Gilman Bank, 99 Mo. App. 571, 578.

[3] Elliott *v.* Blair, 47 Ill. 342; Clough *v.* Seay, 49 Ia. 411; Simpson *v.* Sheley, 9 Kan. App. 512; Jeffrey *v.* Rosenfeld, 179 Mass. 506; Hoffman *v.* Molloy, 91 Mo. App. 367; Bailey *v.* Gilman Bank, 99 Mo. App. 571; Gillette *v.* Smith, 18 Hun 10; Cheek *v.* Nall, 112 N. C. 370.

[4] Parke Co. *v.* White River Lumber Co., 110 Cal. 658; Hoffman *v.* Molloy, 91 Mo. App. 367.

received without giving any equivalent for it, he would not be allowed to enforce an executory obligation, given in exchange for the altered obligation, while repudiating his own obligation on account of the alteration. He must either perform his obligation as if it had not been altered, or rescind both obligations.[1]

Alteration of a Writing before Execution.

To speak of alteration as a method of discharging contracts necessarily assumes a contract at one time binding, and subsequently altered. In some cases, however, a writing is altered before it has by delivery or assent become a binding contract. This most commonly happens where a surety or joint obligor signs an obligation and entrusts it to the principal debtor or co-obligor, who alters it before delivering it to the creditor, but the same question may arise in any case where a writing is entrusted to an agent to deliver and is altered before delivery. It seems clear on principle that, however innocent the obligee may be or however innocently the alteration may have been made, so long as it is material, the obligor cannot be held.[2] He cannot be held on the obligation in its altered form, because he never made or assented to such an obligation. He cannot be held on the obligation in its original form, because that obligation was never delivered nor assented to by the creditor. A court may on equitable principles enforce an obligation, once valid, though technically destroyed or discharged, but it can hardly construct and enforce an obligation which never existed on the ground that the defendant was once willing to enter into such an obligation and would have done so if the writing had not been altered.[3]

This principle is, however, subject to a qualification. If the writing was entrusted to one with actual or apparent authority to

[1] Singleton *v.* McQuerry, 85 Ky. 41.

[2] Ellesmere Brewery Co. *v.* Cooper, [1896] 1 Q. B. 75; Wood *v.* Steele, 6 Wall. 80; State *v.* Churchill, 48 Ark. 426; People *v.* Kneeland, 31 Cal. 288; Pelton *v.* San Jacinto Co., 113 Cal. 21; Hill *v.* O'Neill, 101 Ga. 832; Mulkey *v.* Long, 5 Idaho, 213; Weir Plow Co. *v.* Walmsley, 110 Ind. 242; State *v.* Craig, 58 Ia. 238; Warren *v.* Fant, 79 Ky. 1; Waterman *v.* Vose, 43 Me. 504; Howe *v.* Peabody, 2 Gray 556; Citizens' Bank *v.* Richmond, 121 Mass. 110; Britton *v.* Dierker, 46 Mo. 591; Robinson *v.* Berryman, 22 Mo. App. 509; Mockler *v.* St. Vincent's Inst., 87 Mo. App. 473; McGavock *v.* Morton, 57 Neb. 385; Goodman *v.* Eastman, 4 N. H. 455; McGrath *v.* Clark, 56 N. Y. 34; Crawford *v.* West Side Bank, 100 N. Y. 50, 57; Cheek *v.* Nall, 112 N. C. 370; Jones *v.* Bangs, 40 Ohio St. 139; Newman *v.* King, 54 Ohio St. 273. See also Bracken Co. *v.* Daum, 80 Ky. 388; Sharpe *v.* Bellis, 61 Pa. 69.

[3] This, however, was done in Latshaw *v.* Hiltebeitel, 2 Penny. 257.

make the alteration in question, the obligor will be bound by the instrument in its altered form, and the courts have gone very far in inferring such authority. Thus where a note is entrusted by a signer to one who is to borrow money upon it, and the latter without authority procures additional signatures to the note,[1] or an attesting witness,[2] the original signer is liable. So where a note signed in blank for accommodation and entrusted to the accommodated party is filled out by him, and later before delivery altered,[3] and where a note entrusted to the accommodated party in a complete form was wrongly drawn and was altered before delivery so that it should conform to the intention of the parties;[4] and even where names of obligors previously on the note have been erased and others substituted, the same result has been reached.[5]

Pleading and Evidence.

The pleading appropriate to enable a defendant to take advantage of alteration depends on whether the plaintiff bases his action on the obligation in its original or in its altered form. In the latter case the defendant should deny the making of the contract alleged by plea of *non est factum* or *non assumpsit* or modern equivalents.[6] In the former case the defendant may plead affirmatively that the

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[1] Hochmark *v.* Richler, 16 Col. 263; Governor *v.* Lagow, 43 Ill. 134; Geddes *v.* Blackmore, 132 Ind. 551; Hall's Adm. *v.* McHenry, 19 Ia. 521; Graham *v.* Rush, 73 Ia. 451; Edwards *v.* Mattingly, 107 Ky. 332; Brey *v.* Hagan, 110 Ky. 566; Evans *v.* Partin, 22 Ky. L. Rep. 20, 21; Ward *v.* Hackett, 30 Minn. 150; Babcock *v.* Murray, 58 Minn. 385; Standard Cable Co. *v.* Stone, 35 N. Y. App. Div. 62. But see *contra*, Lunt *v.* Silver, 5 Mo. App. 186, and *cf.* Ellesmere Co. *v.* Cooper, [1896] 1 Q. B. 75.

[2] Hall *v.* Weaver, 34 Fed. Rep. 110.

[3] Whitmore *v.* Nickerson, 125 Mass. 496; Douglass *v.* Scott, 8 Leigh 43. But if the blanks are filled in and the note negotiated, the accommodated party cannot on subsequently recovering the note change its terms. Ofenstein *v.* Bryan, 20 App. D. C. 1.

[4] Boyd *v.* Brotherson, 10 Wend. 93.

[5] Jones *v.* Shelbyville Ins. Co., 1 Met. (Ky.) 58; Hall *v.* Smith, 14 Bush 604, 612; King Co. *v.* Ferry, 5 Wash. 536. It is submitted that this result is wrong. Even though the alteration is not apparent, there can be no ground of estoppel unless the original signer was guilty of negligence. These decisions seem opposed to State *v.* Churchill, 48 Ark. 426; State *v.* Griswold, 32 Ind. 313. See also State *v.* Craig, 58 Ia. 238.

[6] Cook *v.* Coxwell, 2 C. M. & R. 291; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; J. I. Case Co. *v.* Peterson, 51 Kan. 713; Daniel *v.* Daniel, Dud. (Ga.) 239; Conner *v.* Sharpe, 27 Ind. 41; Lincoln *v.* Lincoln, 12 Gray 45; Cape Ann Bank *v.* Burns, 129 Mass. 596; Whitmer *v.* Frye, 10 Mo. 348; Nat. Bank *v.* Nickell, 34 Mo. App. 295; Schwarz *v.* Oppold, 74 N Y. 307; Farmers' Trust Co. *v.* Siefke, 144 N. Y. 354; Zeigler *v.* Sprenkle, 7 Watts & S. 175.

obligation has been altered,[1] but in this country he would also generally succeed by denying the making of the obligation, for the burden would then be on the plaintiff to prove this and on the defendant's objection to the original writing because fraudulently altered and to secondary evidence because the non-production of the original was not satisfactorily accounted for, the plaintiff would be unable to sustain this burden.[2] The affirmative plea is, therefore, strictly necessary only in cases in which the rule of substantive law applicable is more stringent than the rule of evidence, as in jurisdictions where an innocent material alteration is held fatal.

There are many decisions in regard to the admissibility of altered writings in evidence, and presumptions have been laid down as rules of law in a way to confuse the subject. Many courts hold that when a writing offered in evidence shows on its face an alteration, there is a presumption that the alteration was improperly made after the execution of the writing, and that, therefore, a burden is cast upon the party offering the writing to explain the alteration before the writing can be received in evidence.[3] Other courts hold that in the absence of suspicious circumstances there is exactly the opposite presumption, namely, that the alteration was made innocently and legally.[4] Nor is it always clear whether

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[1] Field *v.* Woods, 7 A. & E. 114; Davidson *v.* Cooper, 11 M. & W. 778; Croockewit *v.* Fletcher, 1 H. & N. 893.

[2] First Nat. Bank *v.* Mack, 35 Oreg. 122, 127; Kansas Mut. Ins. Co. *v.* Coalson, 22 Tex., Civ. App. 64.

[3] Brady *v.* Berwind-White Co., 106 Fed. Rep. 824; Warren *v.* Layton, 3 Haring. (Del.) 404; Mulkey *v.* Long, 5 Idaho 213; Mortag *v.* Linn, 23 Ill. 551; Landt *v.* McCullough, 206 Ill. 214; Dewey *v.* Merritt, 106 Ill. App. 156; Rambousek *v.* Supreme Council, 119 Ia. 263; McMicken *v.* Beauchamp, 2 La. 290; Ellison *v.* Mobile, etc. R. Co., 36 Miss. 572 (*cf.* Jackson *v.* Day, 80 Miss. 800); Patterson *v.* Fagan, 38 Mo. 70 (but see Trimble *v.* Elkin, 88 Mo. App. 229, 234); Burton *v.* American Ins. Co., 96 Mo. App. 204; Courcamp *v.* Weber, 39 Neb. 533; Hills *v.* Barnes, 11 N. H. 395; Burnham *v.* Ayres, 35 N. H. 351; Ames *v.* Manhattan Ins. Co., 31 N. Y. App. Div. 180, 185, aff'd 167 N. Y. 584; Simpkins *v.* Windsor, 21 Oreg. 382; First Bank *v.* Mack, 35 Oreg. 122; Clark *v.* Eckstein, 22 Pa. 507; Jordan *v.* Stewart, 23 Pa. 244; Burgwin *v.* Bishop, 91 Pa. 336; Park *v.* Glover, 23 Tex. 469; Collins *v.* Ball, 82 Tex. 259, 268; Bullock *v.* Sprowls, 54 S. W. 657 (Tex., Civ. App.); Elgin *v.* Hall, 82 Va. 680; Bradley *v.* Dell's Lumber Co., 105 Wis. 245.

[4] Doe *v.* Catomore, 16 Q. B. 745; Little *v.* Herndon, 10 Wall. 26; Ward *v.* Cheney, 117 Ala. 241; Corcoran *v.* Doll, 32 Cal. 82; Kendrick *v.* Latham, 25 Fla. 819; Printup *v.* Mitchell, 17 Ga. 558; Bedgood *v.* McLain, 89 Ga. 793; Westmoreland *v.* Westmoreland, 92 Ga. 233; Dangel *v.* Levy, 1 Idaho 722; Stoner *v.* Ellis, 6 Ind. 152; Sirrine *v.* Briggs, 31 Mich. 443; Brand *v.* Johnrowe, 60 Mich. 210; Wilson *v.* Hayes, 40 Minn. 531; Matthews *v.* Coalter, 9 Mo. 696; Stillwell *v.* Patton, 108 Mo. 352; Adams *v.* Yates, 143 Mo. 475, 481; Holladay-Klotz Co. *v.* T. J. Moss Co., 89 Mo. App. 556;

in speaking of presumptions of one sort or another the courts mean that in the absence of any evidence showing innocence or fraud these presumptions apply, or further that there is a burden upon the party who has not the advantage of a presumption of making out his contention by a preponderance of evidence, irrespective of the pleadings.

The tendency of the best modern decisions is to disregard these rules of presumption and to treat each case upon its own facts so far as the duty of adducing further evidence is concerned, and to throw the burden of ultimate proof upon whichever party has the burden of establishing the issue raised by the pleadings.[1]

Samuel Williston.

Paul *v.* Leeper, 98 Mo. App. 515; Dorsey *v.* Conrad, 49 Neb. 243; Hodge *v.* Scott, 95 N. W. Rep. 837 (Neb.); North River Co. *v.* Shrewsbury Church, 22 N. J. L. 424; Cass County *v.* American Bank, 9 N. Dak. 253; Franklin *v.* Baker, 48 Ohio St. 296; Richardson *v.* Fellner, 9 Okl. 513; Foley Co. *v.* Solomon, 9 S. Dak. 511; Farnsworth *v.* Sharp, 4 Sneed 55 (*cf.* Organ *v.* Allison, 9 Baxt. 459); Beaman *v.* Russell, 20 Vt. 205; Wolferman *v.* Bell, 6 Wash. 84; Yakima Bank *v.* Knipe, 6 Wash. 348; Kleeb *v.* Bard, 12 Wash. 140; Maldaner *v.* Smith, 102 Wis. 30. See also Barclift *v.* Treece, 77 Ala. 528; Hart *v.* Sharpton, 124 Ala. 638; Gwin *v.* Anderson, 91 Ga. 827; Galloway *v.* Bartholomew, 74 Pac. Rep. 467 (Oreg.).

In Blewett *v.* Bash, 22 Wash. 536, this presumption was held not applicable to the erasure of a signature as that must necessarily have been done after execution. See also Burton *v.* American Ins. Co., 88 Mo. App. 392.

[1] Rosenberg *v.* Jett, 72 Fed. Rep. 90; Harper *v.* Reaves, 132 Ala. 625; Klein *v.* German Bank, 69 Ark. 140; Hayden *v.* Goodnow, 39 Conn. 164; Baxter *v.* Camp, 71 Conn. 245; Catlin Coal Co. *v.* Lloyd, 180 Ill. 398; Stayner *v.* Joyce, 120 Ind. 99; Hagan *v.* Insurance Co., 81 Ia. 321; Magee *v.* Allison, 94 Ia. 527; University *v.* Hayes, 114 Ia. 690; Ely *v.* Ely, 6 Gray 439; Comstock *v.* Smith, 26 Mich. 306; Stough *v.* Ogden, 49 Neb. 291; Cole *v.* Hills, 44 N. H. 227; Hunt *v.* Gray, 35 N. J. L. 227; Hoey *v.* Jarman, 39 N. J. L. 523; Riley *v.* Riley, 9 N. Dak. 580; Robinson *v.* Myers, 67 Pa. 9; Nesbitt *v.* Turner, 155 Pa. 429; Cosgrove *v.* Fanebust, 10 S. Dak. 213; Conner *v.* Fleshman, 4 W. Va. 693.